Purporting to rely on *Twine* and *Conway* the appellant in their statement of defence averred that the respondent was on the said JKR lorry at the time of the accident "without the express or implied authority of the appellant" and that the respondent boarded the lorry to deliver money to his wife which was a personal matter and not connected with his employment. It would appear from the record of the proceedings before the trial Judge that the appellant attempted to introduce evidence relating to a certain administrative circular dated December 29, 1969 which prohibited all employees from boarding government vehicles without permission. DW2, a JKR supervisor, however, admitted in his evidence that he himself never saw this administrative circular at any time before the hearing. The learned Judge noted that the statement of defence never pleaded that –

(1) There was such a prohibition affecting employees of the appellant; and

(2) The driver had allowed the respondent to travel in the lorry in breach of the prohibition.

Parties are bound by their pleadings and we do not think that the appellant should on the admitted facts of this case be allowed to avoid vicarious liability merely on the bare fact that there was such an administrative circular relating to the prohibition.

Finally, we do not think that the appellant can rely on *Chuan Seng & Co. Pineapples Factory* v. *Idris & Anor.*[5] because there the Court of Appeal held the view that the trial Judge had misdirected himself when he said that "it did not matter whether the deceased were trespassers or invitees" and the Court of Appeal took the view that on the evidence they were clearly trespassers.

Appeal dismissed with costs.

Appeal dismissed.

Solicitors: *Sandu & Co.*

PALMCO HOLDINGS BHD. v. COMMISSIONER OF LABOUR & ANOR.

[S.C. (Lee Hun Hoe C.J. (Borneo), George Seah & Hashim Yeop A. Sani S.C. JJ.) October 31 & December 9, 1985]

[Kuala Lumpur – Supreme Court Civil Appeal No. 111 of 1985]

Labour Law – Termination benefits – Whether regulations ultra vires – Powers of Court – Employment (Termination and Lay-off Benefits) 1980, reg. 8 – Employment Act, 1955, s. 60J.

In this case the appellant had bought over the business of a beach hotel in Penang from the Casuarina Beach Hotel Sdn. Bhd. It was agreed *inter alia* that the plaintiff would offer employment to all existing employees of the hotel except five persons who had passed the retirement age and were relatives of the family who were the former owners of the hotel. The five persons applied to the Director of Labour for termination benefits but the hearing of the application was adjourned to enable the appellant to challenge the *vires* of regulation 8 of the Employment (Termination and Lay-off Benefits) Regulations, 1980. It was argued that the regulation was *ultra vires* as it sought to impose liability on persons other than employers and therefore contravened section 60(J) (1) of the Employment Act, 1955, which only enables the Minister to make regulations for the payment of termination, lay-off and retirement benefits by employers. The learned trial judge held that regulation 8 was not *ultra vires* the Employment Act, 1955 – see [1985] 2 M.L.J. 262. The appellant appealed.

Held, allowing the appeal: it is clear that the powers conferred by section 60J(1) and (2) of the Employment Act, 1955 are not wide enough to cover a person who is not an employer. Regulation 8(2) of the Employment (Termination and Lay-off Benefits) Regulations 1980 is *ultra vires* the Employment Act, 1955, to the extent only that it purports to impose a liability on persons in the situation of the appellant in this case.

[**Editorial Note**: In *Palmco Holdings Bhd.* v. *Commissioner for Labour & Anor.* [1985] 2 M.L.J. 263, we reported that four persons applied to the Director of Labour for termination benefits. However, we are informed by the Honourable Tan Sri Datuk Hashim Yeop A. Sani that "Five and not four persons lodged the claims for termination benefits. This figure is based on the affidavit in support of the application in the High Court and also according to the summons No. 43/82 in the Labour Court which referred the complainants as 'Lau Eng Thean dan 4 orang lain'."]

Cases referred to:

(1) *Carltona Ltd.* v. *Commissioners of Works* [1943] 2 All E.R. 560.
(2) *Lewisham B.C.* v. *Roberts* [1949] 2 K.B. 608.
(3) *Minister of Agriculture & Fisheries* v. *Matthews* [1950] 1 K.B. 148.
(4) *Mc Eldowney* v. *Forde* [1971] A.C. 632, 658.
(5) *Hoffmann-La Roche* v. *Secretary of State* [1974] 2 All E.R. 1128.
(6) *Young* v. *Tockassie* (1905) 2 C.L.R. 470.
(7) *Kumpulan Kamuning Sdn. Bhd.* v. *Rajoo & Ors.* [1983] 2 M.L.J. 400.
(8) *Morton* v. *Union Steamship Co. of New Zealand Ltd.* (1951) 83 C.L.R. 402.
(9) *Dunkley* v. *Evans & Anor.* [1981] 3 All E.R. 285.

SUPREME COURT.

C.V. Das for the appellant.

P.M. Mahalingam (Senior Federal Counsel) for the respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani S.C.J. (delivering the Judgment of the Court) : The facts are not disputed. By an agreement dated April 27, 1981 the appellant, Palmco Holdings Bhd., bought and took over the business of operating the hotel known as the Casuarina Beach Hotel at Batu Ferringhi, Penang from the Casuarina Beach Hotel Sdn. Bhd., a subsidiary of M/s Lau Geok Swee Sdn. Bhd. It was agreed, *inter alia,* under the said agreement that Palmco Holdings Bhd. would offer employment to all existing employees in the undertaking. However, there was also an oral understanding between the parties (not disputed by the appellant)that Palmco Holdings Bhd. would not offer employment to those employees who were relatives of the Lau Geok Swee family and those employees who were past the retirement age and also those who were not regular employees. Apparently because of the oral agreement the appellant did not offer employment to the five persons whose names are set out in paragraph 3 of the affidavit dated July 21, 1983 – page 7 of appeal record. They then claimed for termination benefits.

The hearing of the claims for termination benefits by the said five persons scheduled for hearing on April 25, 1983 was postponed to enable the appellant to challenge the *vires* of the Employment (Termination and Lay-Off Benefits) Regulations 1980 under which the claims were made.

In the High Court, Penang the declarations sought by the appellant may be summarised as follows. It was said that the 1980 Regulations are *ultra vires* the Employment Act 1955 in that the Minister of Labour and Manpower purported to make the regulations under section 102 of the Employment Act 1955 which does not empower the making of regulations on the subject of payment of termination and lay-off benefits. Alternatively a declaration was sought that regulation 8(2) of the said 1980 Regulations is invalid as it was made in excess of the rule-making power of the Minister in that the said regulation *seeks to impose liability on persons other than employers* and therefore contravenes section 60J(1) of the Act which only enables the Minister to make regulation for the payment of termination, lay-off and retirement benefits *by employers.*

During the hearing before the learned Judge it was conceded that the said regulation was made by the Minister of Labour under section 60J(1) and not under section 102 of the Employment Act 1955.

Section 60J(1) reads as follows:

> "The Minister may, by regulations made under this Act, provide for the entitlement of employee to, and for the payment by employer of –
>
> (a) *termination benefits;*
>
> (b) lay-off benefits;
>
> (c) retirement benefits."

As the learned Judge correctly summarised, regulation 8(1) of the 1980 Regulations provides that a contract of service of an employee *shall be deemed to have been terminated* unless (a) within 7 days of the change of ownership the new owner offers to renew the contract of service of the employee or to continue to employ the employee under the terms and conditions of employment which are not less favourable than those under the outgoing owner; and (b) the employee accepts such offer.

Regulation 8(2) reads as follows:

> "If *the person by whom the business is to be taken over immediately after the change occurs* does not offer to continue to employ the employee in accordance with paragraph (1), the contract of service of the employee *shall be deemed to have been terminated,* and consequently, the person by whom the employee was employed immediately before the change in ownership occurs and *the person by whom the business is taken over immediately after the change occurs* shall be jointly and severally liable for the payment of all termination benefits payable under these Regulations." (Emphasis supplied.)

The crucial words for our purpose are "the person by whom the business is taken over immediately after the change occurs". Is such person an employer within the meaning of section 60J(1)?

The powers of the courts on the question of determining the *vires* of a delegated legislation were summed up by Lord Greene M.R. in *Carltona Ltd.* v. *Commissioners of Works*[1] (which was followed in *Lewisham B.C.* v. *Roberts*[2] and *Minister of Agriculture & Fisheries* v. *Matthews*[3]) where His Lordship said:

> "All that the court can do is to see that the power which it is claimed to exercise is one which falls within the four corners of the powers given by the legislature and to see that the powers are exercised in good faith. Apart from that the courts have no power at all to enquire into the reasonableness, the policy, the sense or any other aspect of the transaction."

What the courts should do in the case of this nature are also clearly and precisely explained by

Lord Diplock in *McEldowney* v. *Forde*[4] where he said:

"Parliament makes laws and can delegate part of its power to do so to some subordinate authority. The courts construe law whether made by Parliament directly or by a subordinate authority acting under delegated legislative powers. The view of the courts as to whether particular statutory or subordinate legislation promotes or hinders the common weal is irrelevant. The decision of the courts as to what the words used in the statutory or subordinate legislation mean is decisive. Where the validity of subordinate legislation made pursuant to powers delegated by Act of Parliament to a subordinate authority is challenged, the court has a threefold task: first, to determine the meaning of the words used in the Act of Parliament itself to describe the subordinate legislation which that authority is authorised to make, secondly, to determine the meaning of the subordinate legislation itself and finally to decide whether the subordinate legislation complies with that description."

Lord Diplock in *Hoffmann-La Roche* v. *Secretary of State*[5] at page 1153 also said that he entertained no doubt whatsoever that the courts have jurisdiction to declare invalid a delegated legislation if "in making it the Minister who did so acted outside the legislative powers conferred on him by the previous Act of Parliament under which the order purported to be made".

The term *ultra vires* in relation to a delegated legislation can be interpreted in a double sense. First it can mean that the rule or regulation in question deals with a subject not within the scope of the power conferred upon the delegated legislative authority. Second, it can also mean that although the delegated legislation in question deals with the proper subject it has gone beyond the limits prescribed by the parent law. See also *Young* v. *Tockassie*.[6]

The respondent on the other hand cited *Kumpulan Kamuning Sdn. Bhd.* v. *Rajoo & Ors.*[7] and contended that the Federal Court had accepted the validity of regulation 8 of the 1980 Regulations. We are very clear, however, that the question of the *vires* of regulation 8 was never raised nor considered in that case.

Section 60J(2) of the Employment Act provides that without prejudice to the generality of sub-section (1) regulations made by virtue of sub-section (1) may provide *inter alia:*

"(a) for the definition of the expression "termination benefits", "lay-off benefits", or "retirement benefits", as the case may be, and for the circumstances in which the same shall be payable."

Basically the word "employer" in the Act means any person who has entered into a contract of service to employ another person as an employee. In our view it is clear that the powers conferred by section 60J(1) and (2) of the Act are not wide enough to cover a person who is not an employer. *The person by whom the business is taken over immediately after the change occurs* (these words appear in Regulation 8(2)) is not an employer as defined in the Act. The imposition of liability on such person is never envisaged by the parent Act. As in the case of *Morton* v. *Union Steamship Co. of New Zealand Ltd.*[8] the purpose of the Act is to impose liability upon a set of persons whereas the regulation purports to impose a liability upon another set of persons never intended by the legislature.

We therefore hold that Regulation 8(2) of the Employment (Termination and Lay-Off Benefits) Regulations, 1980 is *ultra vires* the Employment Act 1955 to the extent only that it purports to impose a liability on persons in the situation of the appellant here. But the invalid part of the regulation is not "inextricably interconnected" with the valid part. The doctrine of severability can therefore be applied – see also *Dunkley* v. *Evans & Anor.*[9]

The appeal is accordingly allowed with costs. Deposit to be returned to appellant.

Appeal allowed.

Solicitors: *Shook, Lin & Bok.*

SUPERINTENDENT OF PUDU PRISON & ORS. v. SIM KIE CHON

[S.C. (Salleh Abas L.P., Hashim Yeop A. Sani & Abdoolcader S.C.JJ.) February 3 & 12, 1986]

[Kuala Lumpur – Supreme Court Civil Appeal No. 334 of 1985]

Practice and Procedure – Application for stay of execution of sentence of death – Application to set aside as abuse of process of court – Application to set aside dismissed – Appeal – Function of Pardons Board – Exercise of prerogative of mercy by Yang di-Pertuan Agong – Non-justiciable – Federal Constitution, arts. 32(1) & 42.

Constitutional Law – Prerogative of mercy – Function of Pardons Board – Exercise of prerogative of mercy by Yang di-Pertuan Agong – Non-justiciable – Federal Constitution, arts. 32(1) & 42.

The respondent had been tried and convicted on a charge under section 57(1) of the Internal Security Act,